United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-1227

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- SIR KUE CHIN, Appellant.	Docket No. 75-1227

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

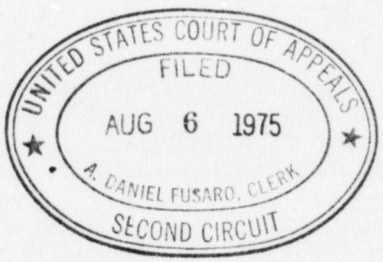

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITY

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QUESTION PRESENTED

Whether the procedure used by the District Judge to attempt to reconcile the Government's proof of two conspiracies with the indictment charging only one conspiracy resulted in prejudicial error requiring reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable William C. Conner) rendered on June 20, 1975, after a trial before a jury, convicting appellant Sir Kue Chin of conspiring to possess and distribute a Schedule I narcotic drug (Count I) (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A)), and of possessing and distributing .04 grams of heroin (Count II) (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A)). Appellant was sentenced to a term of imprisonment of one year on each count, the terms to run concurrently, and to a special parole term of three years.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment and Events Relating to the Charges

On January 10, 1975, an indictment* was filed in the United States District Court for the Southern District of New York charging that Sir Kue Chin with others known and unknown to the grand jury conspired from November 1, 1973, to January 31, 1974, to violate the Federal narcotics laws.** As part of that conspiracy appellant was to possess with intent to distribute and to distribute a narcotic drug.***

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*The indictment is "B" to appellant's separate appendix.

**John Toal, a Drug Enforcement Administration agent, was the sole witness before the grand jury. His testimony there was that appellant revealed the name of his supplier to either Soo Yuen, an informant for the Government, or to another undercover Government agent. However, Toal did not reveal this person's identity. See minutes of the grand jury dated December 16, 1974, at 6. (A copy of the grand jury minutes in this case is "D" to appellant's separate appendix). The indictment also charged appellant with possessing and distributing .04 grams of heroin on November 4, 1973.

***The indictment alleged five overt acts: (1) On or about November 4, 1973, Sir Kue Chin went to the vicinity of a coffee shop on Mott Street in New York City; (2) On or about November 21, 1973, the defendant spoke with one Stephen Tse; (3) on or about November 26, 1973, the defendant had a conversation with Stephen Tse; (4) on or about December 12, 1973, the defendant went to the vicinity of a restaurant on Pell Street in New York City; and (5) on or about December 20, 1973, the defendant went to the vicinity of the Wah Sun Coffee Shop on Mott Street in New York City. See "B" to appellant's separate appendix.

Appellant was tried on the two counts charged in the indictment. After the testimony was concluded defense counsel made a motion to dismiss the conspiracy charge (370*) because the Government's proof established not one, but two, conspiracies.** The District Judge concluded that the proof did show two conspiracies (376, 381-382): The first was between appellant and Wong Lim; the second, consummated after the failure of the first conspiracy (375-382),*** was between appellant and Mong Wong.

However, Judge Conner did not dismiss the indictment, but permitted the Government to elect which of the two conspiracies to submit to the jury (and which overt acts to excise from the indictment) (376). The Government chose to prosecute the conspiracy between appellant and Wong Lim, the first conspiracy (377),**** and excised overt act five*****

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*Numerals in parentheses refer to pages of the transcript of the trial.

**Defense counsel's motion was also based on the insufficiency of the evidence of both conspiracies shown (370).

***This is based on the testimony of Soo Yuen, a Government informer, who stated that a sample of heroin from appellant on November 4, 1973, did not come from Mong Wong, and that Mong Wong was a new source (163).

****Without indicating the basis for such a ruling, the Judge held that testimony about the second conspiracy would not be stricken (383).

*****As indicated, the fifth overt act charged in the indictment alleged that on or about December 20, 1973, appellant went to the vicinity of the Wah Sun Coffee Shop. See "B" to appellant's separate appendix.

from the indictment.

Defense counsel argued that the evidence concerning Mong Wong and the second conspiracy infected the entire case:

> Your Honor, I think that so much proof and cross examination has been adduced in connection with the involvement with Mong Wong, direct examination, cross examination, that we know Mong Wong is a convicted felon, who may have associated with the defendant; all that because Mong Wong was regarded as a co-conspirator here. Mong Wong's presence in this case, evidentiary presence, has really infected the entire case, to the point where as a matter of law count one has got to go in my judgment, because they cannot at the last minute say, "Oh, tough, I'm sorry, we didn't investigate properly, we didn't look at this case sufficiently thoroughly to make our election at an earlier time."
>
> (379-380).

He explained to the Judge how the testimony about the second conspiracy influenced his actions at trial:

> Your Honor, I see great prejudice here for reasons stated before, but in addition, as you remember, the tail end of my cross examination involved this fellow Mong Wong who got a free ride, and now they're to hear that by reason of the government's election, and it was their choice, they could have picked the first, they picked the second to excise, as a result of the government's election at the last moment, my Mong Wong argument so to speak, goes out the window, because suddenly he's not a co-conspirator, as my cross examination showed he was. Now that is dangerous to us, because I'm going to look to them as someone who is speaking in bad faith, and suddenly they'll hear your Honor say, "Oh, Mong Wong is not a co-conspirator in this indictment."
>
> (386-387).

The Judge found no prejudice in the procedure employed (382-383, 388), finding that the evidence of the Mong Wong conspiracy could remain in the case on the theory that it was proper circumstantial evidence of the conspiracy with Wong Lim (386), and that it was not prejudicial because appellant was the hub of both conspiracies (386).

Defense counsel, recognizing the difficulty in having the jury told that Mong Wong was not a conspirator after his cross-examination had revealed the contrary* in an effort to establish a factual basis for a charge to the jurors instructing them to render a judgment of acquittal if two conspiracies were shown (see 383-384), rejected the court's offer to tell the jurors that Mong Wong was not a conspirator (391). Counsel explained he was on the horns of a dilemma because his strategy would seem deceitful to the jury in the face of such an instruction. He then moved for a mistrial (387). The motion was denied (388).

B. The Evidence of the Two Conspiracies

The evidence at trial relevant to the conspiracy between appellant and Wong Lim consisted of appellant's statement in the November 4 meeting that a pound and a half of heroin was available at $30,000 (51) and that this pound and a half belonged to Wong Lim (168).

*See 161-162.

The much more extensive evidence of the second conspiracy between appellant and Mong Wong consisted of appellant's statement on December 20, 1973, to Soo Yuen, an informer for the Government, that the one-half pound of heroin Soo Yuen desired to purchase would cost $8,000 (61), and that the stuff belonged to "Canal Street Wah Foon, a person named Mong Wong" (62). Additionally, Soo Yuen testified that on December 20, 1973, he met appellant and they both went to the Wah Foon Trading Company (64) where appellant went to the basement and returned with Mong Wong (64-65). Further, Soo Yuen's trial testimony showed that a few minutes later Mong Wong, appellant, and Soo Yuen met and discussed the purchase of narcotics (66). Soo Yuen's testimony about the December 20 meeting with appellant and Mong Wong was corroborated by two Drug Enforcement Administration agents, Andrew Fenrich and John Toal.*

In his summation the Assistant United States Attorney discussed Soo Yuen's testimony about the December 20 meeting with Mong Wong, and argued that Fenrich's and Toal's testimony corroborated Soo Yuen's account of that meeting (407-408).

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*Fenrich testified that on December 20 he saw appellant sitting at a table in a restaurant with Soo Yuen and a third individual (231). Toal testified that he saw Mong Wong, whom he knew, go into that restaurant (250-251). Also, a three-page English transcript of audible words from tapes of Soo Yuen's conversations held on December 20, 1973, was introduced into evidence. The tapes themselves were mostly unintelligible and inaudible.

C. The Court's Charge* and the Jurors' Consideration of the Evidence

During the course of his charge, Judge Conner instructed the jurors that they were required to find that appellant "entered into a conspiracy with some other person, for example, Mr. Lim" (456). The Judge then repeated this instruction the following day during the jurors' deliberations (502). At that time, and out of the presence of the jury, defense counsel requested that the Judge instruct the jurors that the agreement, if found, must be between appellant and Wong Lim, since Mong Wong was not appellant's co-conspirator. The Judge declined this request on the theory that the indictment did not name anyone in particular, so the co-conspirator could be Wong Lim or someone else (503).

Further, the District Judge indicated that four overt acts were charged in the indictment (457), and read those paragraphs (457-458).

In spite of the decision not to submit the Mong Wong conspiracy to the jury, the jurors focused on that conspiracy and the testimony about Mong Wong. One-half hour after the deliberations began the jurors asked at which meeting Mong Wong was present and requested and were given the three-page transcript of that meeting which had been entered into evi-

*The complete charge is "C" to appellant's separate appendix.

dence. Further, at the jurors' request the testimony of Drug Enforcement Administartion Agents Fenrich and Toal about the December 20 meeting between appellant, Soo Yuen, and Mong Wong was read (506).

Late on the second day of deliberations the jury found appellant guilty of Counts I and II of the indictment (508).

ARGUMENT

THE PROCEDURE USED BY THE DISTRICT JUDGE TO ATTEMPT TO RECONCILE THE GOVERNMENT'S PROOF OF TWO CONSPIRACIES WITH THE INDICTMENT CHARGING ONLY ONE CONSPIRACY RESULTED IN PREJUDICIAL ERROR REQUIRING REVERSAL.

The indictment charged appellant with a single conspiracy to violate the Federal narcotics laws. After trial, defense counsel requested dismissal of the indictment because the Government's proof established two conspiracies. The Judge ruled that the Government had indeed proved two conspiracies, one with Wong Lim and one with Mong Wong. He required the Government to select one of the two conspiracies to be presented to the jurors. The Government elected to present the conspiracy with Wong Lim. The Judge did not advise the jurors not to consider evidence of the second conspiracy, nor did he give them any guidance on the purposes for which they could consider the testimony. To effectuate the Government's choice the Judge simply struck the fifth overt act charged from the indictment.

The procedure followed by the District Judge resulted in prejudicial variance, improper amendment of the indictment by the court, and violation of double jeopardy.

A. Prejudicial Variance

The District Judge's ruling that the proof at trial showed two separate conspiracies although the indictment charged but one established a prohibited variance. Because the variance was prejudicial, the conviction must be reversed and the indictment dismissed. Kotteakos v. United States, 328 U.S. 750, 769 (1946); United States v. Russano, 257 F.2d 712, 715 (2d Cir. 1958);* United States v. Miley, 513 F.2d 1191, 1207 (2d Cir. 1975).

Here the Government's proof of two conspiracies showed appellant to be involved in similar criminal conduct. The evidence of the second conspiracy was unnecessary to show intent, identity, or any other element of the conspiracy which was selected for submission to the jury.** See

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*The Ninth Circuit has stated that the variance between proof of several separate conspiracies when one has been charged is per se prejudicial. Rocha v. United States, 288 F.2d 545, 553 (9th Cir. 1961).

**After Soo Yuen, the Government informer, and Agent Stephen Tse testified, the District Court ruled that evidence of prior similar acts was unnecessary "because there is no real question about the identification of the defendant, nor is there any real question about intent. If the jury believes the testimony of the two witnesses, I think the identification and the intent are clear" (227). The Assistant U.S. Attorney agreed (227).

The reasoning of this ruling also applies to the evidence about the subsequent conspiracy between Mong Wong and appellant. If the testimony of the witnesses were believed, there would be no question about appellant's intent or identity in relation to the conspiracy between Wong Lim and appellant.

Mathews v. United States, 457 F.2d 1371, 1381 (5th Cir. 1969); compare United States v. Marchisio, 344 F.2d 653, 667 n.11 (2d Cir. 1965); United States v. Mancuso, 444 F.2d 691, 695 (2d Cir. 1975).

The impact of the evidence concerning the conspiracy involving Mong Wong could only have had the improper effect of showing that appellant was a man involved in narcotics violations generally,* and not of proving the crime that went to the jury for consideration. Wigmore, ON EVIDENCE, §51 at 456; cf. United States v. Wolfson, 437 F.2d 862, 873 (2d Cir. 1970); United States v. Perry, slip opinion 2583, 2599 (2d Cir., March 28, 1975); United States v. Kelly, 445 F.2d 1285, 1288 (2d Cir.), cert. denied, 406 U.S. 962 (1971); United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967); see also Michelson v. United States, 335 U.S. 469, 475-476 (1968); cf. United States v. Phillips, 270 F.2d 175, 177 (2d Cir. 1959). In fact this impermissible basis for admission of the evidence was the reason given by the Judge as to why it was properly in evidence. Indeed he said it was admissible on the ground that it was circumstantial evidence of the Wong Lim conspiracy. Such a theory, however, is the primary reason for exclusion of such evidence.

*Moreover, the jurors focused on the evidence about Mong Wong. After a short period of deliberation, they asked at which meeting Mong Wong was present. At their request the testimony of Fenrich and Toal about the meeting at which Mong Wong was present was re-read. The jurors also received at their request the three-page transcript of tapes recorded on December 20.

Evidence of the conspiracy with Mong Wong also influenced counsel's cross-examination and conduct at trial. Counsel's cross-examination of Government witnesses elicited the facts showing that two separate conspiracies were involved here (161-163), and thus that appellant was involved in numerous drug transactions. This proof elicited by counsel was damning in the jury's eyes, but had the beneficial effect of entitling appellant to an instruction to the jurors that they would have to acquit appellant if two conspiracies were shown. United States v. Calabro, 449 F.2d 885, 893-894 (2d Cir. 1971); cf. United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir. 1974); United States v. Sperling, 506 F.2d 1323, 1341 (2d Cir. 1974). Defense counsel's position was that such an instruction was required (384, 385). However, the procedure adopted by the District Court of excising overt act five obviated the possibility that this instruction would be given.

Counsel repeated his earlier position that the procedure adopted by the District Court was prejudicial,* adding that:

> [t]he tail end of my cross examination involved this fellow Mong Wong who got a free ride, and now they're to hear that by reason of the government's election, and it was their choice, they could have picked the first, they picked the second to excise, as a result of the government's election at the last moment, my Mong Wong argument so to speak, goes out the window, because suddenly he's not a co-conspirator, as my cross examination showed he was. Now

*Defense counsel had stated earlier that Mong Wong's presence had infected the entire case (379).

> that is dangerous to us, because I'm going to look to them as someone who is speaking to them in bad faith, and suddenly they'll hear your Honor say, "Oh, Mong is not a co-conspirator in this indictment."
>
> (387).

Thus, counsel was placed in the intolerable position of having been forced by the procedure utilized to prove facts which prejudiced his client's case without the benefit of the favorable instruction which those facts required. As a result, he moved for a mistrial, which was denied.

Not only was the variance prejudicial so as to require reversal, but the defect required the Judge to enter a judgment of acquittal, just as a jury was required to do if it found two conspiracies. See United States v. Sperling, supra, 506 F.2d at 1341; United States v. Sisca, supra, 503 F.2d at 1345.

B. Amendment of the Indictment by the Court

The grand jury testimony upon which the indictment was based implied that appellant had a single supplier who furnished the drug sample to the Government informer and who was later to supply a larger quantity of drugs for sale. Based on this proof, the grand jury returned the indictment. However, the proof at trial showed that the supplier of the sample could not furnish the larger quantity and that another supplier entered the scene. In attempt to get around the difficulty caused by the difference in theory presented by

the evidence before the grand jury and the evidence at trial (see United States v. Silverman, 430 F.2d 106, 107 (2d Cir. 1970)), the Judge permitted the Government to select the conspiracy which would be submitted to the jurors. In effect, the Judge permitted the Government to go to the jury on a theory of guilt substantially different from that presented to the grand jury. To effectuate this change in theory, the Judge excised overt act five from the indictment. This procedure amounted to an amendment of the indictment and requires reversal. United States v. Wolfson, 437 F.2d 862, 873 (2d Cir. 1970); Ex parte Bain, 121 U.S. 1, 7 (1887); Stirone v. United States, 361 U.S. 212, 217 (1960); United States v. Russell, 369 U.S. 749, 770 (1962).

If the grand jury had been aware that two conspiracies were involved and/or that testimony about the events on December 20, 1973, involving appellant were irrelevant, the grand jury might not have indicted him for conspiracy since the separate evidence of conspiracies which appeared to be related when presented to the grand jury may only have been cumulatively persuasive in the decision to indict. However, the procedure followed at trial allowed appellant to be tried on a theory which the grand jury had not considered. This procedure usurped the function of the grand jury:

> This policy [of prohibiting the usurpation of power by the court and the prosecutor] is effectuated by preventing the prosecution from modifying the theory and evidence upon which the indictment is based.
>
> United States v. Silverman, supra, 430 F.2d at 110.

As the Supreme Court has stated:

> [I]f it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus charged, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.
>
> Ex parte Bain, supra, 121 U.S. at 13.

The choice by the Government of the conspiracy to be submitted to the jury differing from that charged by the grand jury and the deletion of overt act five from the indictment amounted to a fundamental change in the basis of the indictment and requires reversal. Cf. United States v. Cirami, 510 F.2d 69, 72 (2d Cir. 1975); see also United States v. DeCavalcante, 440 F.2d 1264, 1276 (3d Cir. 1971) (concurring opinion); United States v. Silverman, supra, 430 F.2d at 110.

C. Violation of the Double Jeopardy Clause

An indictment must implement the Fifth Amendment's protection against being put twice in jeopardy for the same offense. United States v. Cavalcante, supra, 440 F.2d at 1269; Russell v. United States, supra, 369 U.S. at 763-764. Thus, the Supreme Court has stated that one of the criteria for measuring the sufficiency of an indictment is whether the indictment would reflect crimes with which an individual were accused and therefore serve as protection against the same charges being lodged again. Russell v. United States, supra, 369 U.S. at 763-764.* Here, as a result of the procedures used by the court to correct the impermissible variance, it is unclear what the jury's decision reflects and what additional charges appellant may be subject to in accordance with the double jeopardy clause.

The jury was not instructed that the Mong Wong conspiracy was not before them. Indeed, the Judge's instructions implied the contrary. He told the jurors that they could find appellant guilty if they found appellant conspired with someone else, "for example, Mr. Lim." Although the Judge explained at a meeting outside the jury's presence that this was meant to include those conspirators not

*Where conviction follows trial, reliance must be placed on the indictment itself. Cf. Russell v. United States, supra, 369 U.S. at 763-764. This is so because evidentiary rules may allow, at trial, proof of acts or facts unrelated to guilt or innocence but which may be relevant in determining other aspects of the trial, e.g., credibility.

known to the grand jury, in fact the evidence produced by the Government indicated only that Wong Lim and Mong Wong were involved. Thus, the instruction left the jurors free to consider that Mong Wong was a conspirator.

Further, the Judge did not strike the evidence of the Mong Wong conspiracy, nor did he advise the jurors that the evidence of the Mong Wong conspiracy could be considered for any limited purpose.* It is clear from the jurors' questions submitted during deliberations that they considered this evidence. Thus, the jurors were free to consider that evidence as guilt of the single conspiracy charged, when it was legally improper for them to consider that crime.

Thus, there is no way of knowing the basis of the crime the jury convicted appellant of having committed. This violation of the protection afforded by the double jeopardy clause requires reversal.**

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*It is appellant's position that the evidence of the Mong Wong conspiracy could not be considered for any purpose. See discussion supra at 11-13.

**Moreover, since the indictment alerted appellant that he was charged with one conspiracy to violate the Federal narcotics laws and two were shown at trial, the indictment did not adequately apprise appellant of the nature of the charge and the cause of the accusation in accordance with the requirements of the Sixth Amendment. See United States v. DeCavalcante, 440 F.2d 1264, 1269 (3d Cir. 1971).

CONCLUSION

For the foregoing reasons the judgment of conviction should be vacated and a new trial granted on Count II of the indictment. Count I should be dismissed with prejudice.

Respectfully submitted,

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Certificate of Service

August 6, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

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